

**Geiger Ready-Mix Co. of Kansas City, Inc.; Geiger Ready-Mix Co. of Kansas, Inc.; Geiger Ready-Mix Co. of Missouri, Inc.; and Geiger Ready-Mix Co., Inc.; a Single Employer and Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541, affiliated with International Brotherhood of Teamsters, AFL-CIO. Case 17-CA-16244**

December 16, 1994

**DECISION AND ORDER**

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 28, 1993, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief. Additionally, the General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions,<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

<sup>1</sup> The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondents assert that the judge's findings are a result of bias and prejudice. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

<sup>2</sup> In adopting the judge's conclusion that the Respondents violated Sec. 8(a)(5) and (1) of the Act by failing to give the Union requested information concerning customers and jobsites, we do not rely on the judge's statement that an employer's opinion that requested information is confidential is irrelevant to the duty to supply it. After a union has established the relevance of the information it seeks, an employer asserting a confidentiality claim has the burden of demonstrating a legitimate and substantial confidentiality interest that outweighs the union's need for the desired information. *Mary Thompson Hospital*, 296 NLRB 1245 fn. 1 (1989). Here, as the judge found, the requested customer and jobsite lists related to the Union's reasonable belief that the Respondents were transferring unit work to nonunit employees, and were plainly relevant to the Union's representational duties. We further find that although the Respondents offered to meet and bargain with the Union about their confidentiality concerns, the Respondents have failed to establish that they had a significant interest in keeping such information confidential. For example, there is no evidence that the Respondents requested that union representatives keep the customers' names and the jobsites confidential. See *AGA Gas, Inc.*, 307 NLRB 1327 fn. 2, 1331 (1992).

<sup>3</sup> The General Counsel excepts to the judge's failure to include in his recommended Order and notice language concerning the Respondents' affirmative obligation to provide the Union with the requested information concerning customers and jobsites. We find

1. We agree with the judge's finding that the complaint is not time-barred because the underlying charge was both filed and served within the 6-month limitations period set forth in Section 10(b) of the Act. However, we correct certain factual errors in the judge's analysis, including the judge's inadvertent finding that the limitations period ended and the charge was filed and served in June 1992, rather than July 1992. The alleged unlawful conduct occurred and was communicated to the unit employees on January 10, 1992. Pursuant to Section 102.111 of the Board's Rules and Regulations, the statutory period therefore commenced on the following day, January 11, and ended 6 months later on July 11, 1992. The Union filed its charge with the Board on July 8, 1992. Section 102.113 of the Board's Rules and Regulations authorizes service of process by registered or certified mail, and Section 102.112 provides that service is accomplished when the material is deposited in the mail. See *National Automatic Sprinklers*, 307 NLRB 481 fn. 1 (1992). Here, the Regional Office sent the charge to the Respondents by certified mail on July 8. We therefore find, in agreement with the judge, that the charge was filed and served within the statutory period. Regarding the Respondents' contention that under the Federal Rules of Civil Procedure, service is not accomplished until a document is received by the party being served, we note that the Federal Rules of Civil Procedure do not govern service of process in Board proceedings. *Control Services*, 303 NLRB 481, 481 (1991), *enfd.* by unpublished decisions 961 F.2d 1568 (3d Cir. 1992); 975 F.2d 1551 (3d Cir. 1992). In any event, the Respondents received the charge on July 9, prior to the expiration of the statutory period.

2. The judge found that the Respondents violated Section 8(a)(5) and (1) of the Act on January 10, 1992, by unilaterally halting operations at the unionized Speaker Road plant, laying off unit employees, and transferring unit work to nonunit employees without first giving the Union notice and an opportunity to bargain.<sup>4</sup> In so finding, the judge questioned the applicability of *Dubuque Packing*,<sup>5</sup> finding that the Respond-

merit in the General Counsel's exception, and shall amend the judge's recommended Order and notice accordingly.

Although the judge in sec. I.B, par. 4 set forth a description of the job classifications included in the bargaining unit that corresponds with the description in the complaint, he inadvertently included "batchmen" in his conclusions of law, recommended Order, and notice. We shall correct the errors.

<sup>4</sup> The Respondents, single employers, operate an integrated and double-breasted ready-mix cement business in the greater Kansas City area. The Union represents the drivers, mechanics, and mechanic helpers at the Speaker Road plant; employees at the three other plants have not been represented since 1989.

<sup>5</sup> 303 NLRB 386 (1991), *enfd.* in relevant part sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted* 114 S.Ct. 1395 (Apr. 4, 1994), *cert. dismissed* 114 S.Ct. 2157 (1994). In *Dubuque*, the Board developed a burden-

*Continued*

ents' conduct did not involve an entrepreneurial decision aimed at changing the scope and direction of the enterprise that was exempt from the statutory duty to bargain under *Dubuque* and *First National Maintenance Corp. v. NLRB*.<sup>6</sup> The judge found instead that, like the employer's subcontracting in *Torrington Industries*,<sup>7</sup> the Respondents' decision was "a cost-cutting exercise aimed at replacing higher priced drivers with lower priced drivers" that was subject to the duty to bargain. For the following reasons, we agree with the judge's conclusion that the Respondents' decision was a mandatory subject of bargaining and that the Respondents unlawfully failed to bargain with the Union about the decision.<sup>8</sup>

As a threshold matter, we reject the Respondents' contention that for purposes of determining whether the Respondents unlawfully transferred bargaining unit work out of the unit, the Board should limit the definition of "unit work" to "work for contractors who have a contract with Local 541 [the Union] delivered by . . . [Speaker Road] drivers." Although the Respondents maintain that by late 1991 the Speaker Road plant no longer received orders from union contractors and that any of the nonunion plants could have provided concrete to the remaining nonunion customers, we find that the Respondents' nonunion drivers faced more job assignment restrictions than did the unit drivers. As the judge found, although the Union permitted the unit drivers to deliver concrete batched by nonunion labor at the Lenexa and Liberty plants, the nonunion drivers at those plants were not permitted to deliver cement batched at Speaker Road, although they sometimes delivered concrete to union jobsites. Within these limitations, job location and truck availability influenced delivery assignments.<sup>9</sup> Regarding the former, the judge found that the Speaker Road plant was the hub of the Respondents' operation and the location of

the Respondents' central dispatching system, with quick and easy access to many jobsites. The judge found that this system furthered job and customer interchange among the four plants. For all these reasons, the judge found that the "unit work" at issue was not a discrete segment of the Respondents' total concrete production process or market, but was part of an integrated system producing a "fungible" and "interchangeable" commodity. Under the circumstances, we agree with the judge's characterization of bargaining unit work as including all concrete customarily batched and delivered by the unit drivers from the Speaker Road plant to both union and nonunion jobsites, as well as concrete batched at nonunion plants and customarily delivered by the Speaker Road unit drivers because of factors such as job location and truck availability. We therefore find no merit in the Respondents' contention that no unit work was available to be transferred out of the unit in January 1992.

We also agree with the judge that the Respondents' January 1992 closure of the Speaker Road plant and the accompanying layoff of the unit employees did not constitute a relocation of unit work within the *Dubuque* test, which the Board devised for plant relocations potentially involving complex decisions respecting both the allocation of capital and the replacement of one group of employees with another.<sup>10</sup> Such decisions are not involved here. In fact, the Respondents did not "relocate" the Speaker Road plant in the sense of permanently closing the facility and relocating its operations to other locations.<sup>11</sup> Rather, as the judge found, the Respondents intended that the plant's closure be temporary, as demonstrated by the fact that management had reopened the Speaker Road plant by early March. Neither did the Respondents permanently relocate the plant's physical assets. Although management transferred some of the Speaker Road trucks to other plants following the January suspension of operations, the Respondents returned some of the trucks to Speaker Road in March, and by April 1993, 12 to 14 trucks operated from Speaker Road. We further note that although in late February 1992 the Respondents transferred the title to all of the Speaker Road assets to another Geiger corporation, the Respondents' president admitted that the transaction was essentially an easily reversible "paper transfer." Finally, the Respondents did not relocate the laid-off unit employees; as the judge found, the layoffs were permanent and the

shifting test to determine whether a decision to relocate bargaining unit work is a mandatory subject of bargaining. See 303 NLRB at 391.

<sup>6</sup> 452 U.S. 666 (1981).

<sup>7</sup> 307 NLRB 809 (1992).

<sup>8</sup> We also adopt the judge's finding that the Respondents violated Sec. 8(a)(5) and (1) by failing to bargain with the Union over the effects of its decision. The Respondents were obligated to provide the Union with preimplementation notice of the decision to close the Speaker Road plant to satisfy an employer's effects-bargaining obligation, but instead presented the closure decision to the Union as a fait accompli. See *Chrissy Sportswear*, 304 NLRB 988, 989 fn. 6 (1991); *Los Angeles Soap Co.*, 300 NLRB 289 fn. 1 (1990).

Additionally, we agree with the judge's finding that the Union did not waive its right to bargain about the Respondents' decision to transfer unit work and about the effects of that decision. The language in the management-rights provision of the parties' collective-bargaining agreement does not meet the clear and unmistakable standard governing the waiver of statutory rights. See *Owens-Brockway Plastic Products*, 311 NLRB 519, 525 (1993).

<sup>9</sup> Concrete must be delivered within an hour from the time a truck is dispatched from the batching plant.

<sup>10</sup> *Holmes & Narver*, 309 NLRB 146, 147 (1992).

<sup>11</sup> Cf. *Seminole Intermodal Transport*, 312 NLRB 236 (1993) (employer permanently closed its Columbus terminal and relocated all its Columbus trucking work to Springfield, thereby relocating the terminal; decision was a mandatory subject of bargaining under *Dubuque*, above, because, inter alia, there was no change in the operation and the employer did not meet its burden of establishing that the union could not have offered labor cost concessions that could have changed the employer's decision to relocate).

Respondents never recalled the laid-off unit employees. Instead, to maintain essentially the same level of production, the Respondents reassigned nonunit drivers to deliver concrete batched at Speaker Road and reassigned Speaker Road work to the nonunion plants.<sup>12</sup> Thus, unit work remained at Speaker Road after a brief interruption but was performed by different employees.

Because this case concerns the reassignment of unit work rather than a plant relocation, *Torrington Industries*, supra, cited by the judge, is controlling. The Board in *Torrington Industries* found that in cases factually similar to *Fibreboard Corp. v. NLRB*,<sup>13</sup> when virtually the only circumstance the employer has changed is the identity of the employees doing the work, there is no need to apply the multilayered test of *Dubuque* to determine whether the decision is subject to the statutory duty to bargain because *Fibreboard*, supra, has already held that such decisions are mandatory subjects of bargaining. As in *Fibreboard*, the Respondents' assignment of nonunit employees to deliver concrete batched at Speaker Road involved the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer for lower wages.<sup>14</sup> Thus, noting that the Respondents have not demonstrated that the temporary closure and layoff were based on entrepreneurial decisions that are outside the range of bargaining and that the Respondents made no changes in the production process, we find, in agreement with the judge, that the decision did not involve a change in the scope and direction of the enterprise that is exempt from the statutory bargaining obligation.<sup>15</sup> In fact, the Respondents' decision pre-

sents an even stronger case for finding a duty to bargain than the employer's decision in *Torrington Industries* because, as the judge found, the Respondents based the decision to close the Speaker Road plant temporarily, lay off union employees, and reassign unit work primarily on labor costs.<sup>16</sup> Similarly, regarding the Respondents' transfer of unit work to its nonunion plants, the Board has found that an employer violates Section 8(a)(5) and (1) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-bargaining representative.<sup>17</sup>

Based on the above, we find, in agreement with the judge, that the Respondents violated Section 8(a)(5) and (1) by failing to provide notice to and bargain on request with the Union concerning the decision to close the Speaker Road plant, lay off unit employees, and reassign bargaining unit work.<sup>18</sup>

exist in the case of a permanent, as opposed to a temporary, plant shutdown.

Because the unit employees were simply replaced and their layoff was not part of an elimination of the unit work, we reject the Respondents' contention that the decision to close the Speaker Road plant is exempt from mandatory bargaining under *First National Maintenance Corp. v. NLRB*, above, 452 U.S. 666.

<sup>16</sup> See *Power, Inc.*, 311 NLRB 599, 599 (1993).

We note that we do not disagree with Member Cohen that the subcontracting decision here is within the category of decisions that Justice Stewart, in his *Fibreboard* concurrence and the Supreme Court in *First National Maintenance*, supra (embracing Justice Stewart's analysis), concluded were subject to a balancing test. But in our view, when the facts of the subcontracting are as we have found them here, it is unnecessary to retrace all the steps in striking the balance that was originally approved in Justice Stewart's analysis in *Fibreboard*. We also note that this case is distinguishable from *Furniture Renters of America v. NLRB*, 36 F.3d 1240 (3d Cir. 1994), in which the court found that the Board should have scrutinized the amenability to bargaining of the reasons for the employer's subcontracting where thefts of property were a major reason for the decision and wages and benefits were not a factor, since the employer was paying higher wages to the crews to which it had subcontracted the work.

<sup>17</sup> *Harris-Teeter Super Markets*, 307 NLRB 1075 fn. 1 (1992); citing *Kohler Co.*, 292 NLRB 716, 720 (1989). See also *A-1 Fire Protection*, 273 NLRB 964, 966 (1984), enfd. sub nom *Plumbers & Pipe Fitters Local 669 v. NLRB*, 789 F.2d 9 (D.C. Cir. 1986) (the allocation of work to a bargaining unit is a term or condition of employment which cannot be changed without bargaining with the union).

<sup>18</sup> Member Cohen agrees with his colleagues that the decisions involved herein (which involve more than subcontracting) are mandatory subjects of bargaining. However, he wishes to emphasize that the decisions do not fall within the ambit of "category 2" of *First National Maintenance (FNM)*. Accordingly, rather than find the decision to be clearly and inherently mandatory, he applies the balancing test for "category 3" decisions under *FNM*. See discussion in *Dubuque Packing*, supra at 390. Applying that test, he notes that the decisions herein did not represent a change in the scope and direction of the enterprise. In addition, the decisions were motivated primarily by labor cost considerations. In these circumstances he agrees that the decisions involve mandatory subjects of bargaining.

<sup>12</sup> This case is distinguishable from the proposed Board decision in *Tel Plus*, reported at 313 NLRB No. 47 (not reported in Board volumes) (1993) (charge subsequently withdrawn pursuant to settlement agreement), in which the Board, applying *Dubuque*, found that the respondents violated Sec. 8(a)(5) by unilaterally subcontracting unit work and by transferring unit work to employees in a different unit without the union's consent. The unit employees in *Tel Plus* repaired telephone systems at customers' premises. Since they were dispatched by phone, and delivered parts directly to worksites, the repair persons went directly to customer locations from home and drove company vans home at night, reporting to the office only when necessary to pick up equipment or attend meetings. *Tel Plus* involved a physical relocation of operations under *Dubuque* because, unlike in this case, the respondents permanently closed the facility from which the repair persons were dispatched and changed the locus of operations from Long Island to Queens, New York. Under those circumstances, the Board found that the General Counsel established a prima facie case, which the respondents failed to rebut or defend, that the closing was a work relocation that was unaccompanied by a basic change in the operation of the business, and was therefore a mandatory subject of bargaining.

<sup>13</sup> 379 U.S. 203 (1964).

<sup>14</sup> As indicated, the parties stipulated that the Respondents are single employers.

<sup>15</sup> However, we do not rely on the judge's suggestion that permanent change in the direction and scope of an enterprise can only

## AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3.

“3. The following constitutes a unit appropriate for collective bargaining:

“All full-time and regular part-time drivers, mechanics, and mechanic[s] helpers employed by the Respondent Geiger Ready-Mix Co. of Kansas City, Inc., in the counties of Jackson, Clay, Platte, Ray, Lafayette, Johnson, Bates, Henry, and Cass in Missouri and Wyandotte, Johnson, Leavenworth, and Miami in Kansas, excluding all office clerical employees, supervisors, and guards as defined in the Act, and all other employees.”

ORDER<sup>19</sup>

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Geiger Ready-Mix Co. of Kansas City, Inc., Kansas City, Kansas; Geiger Ready-Mix Co. of Kansas, Inc., Lenexa, Kansas; Geiger Ready-Mix Co. of Missouri, Inc., Liberty, Missouri; and Geiger Ready-Mix Co., Inc., Leavenworth, Kansas, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Refusing to bargain collectively in good faith with Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of its full-time and regular part-time drivers, mechanics, and mechanic helpers employed in the counties of Jackson, Clay, Platte, Ray, Lafayette, Johnson, Bates, Henry, and Cass in Missouri, and Wyandotte, Johnson, Leavenworth, and Miami in Kansas, excluding all office clerical employees, supervisors, and guards as defined in the Act, and all other employees.”

2. Substitute the following for paragraph 2(c).

“(c) Transfer back to the Speaker Road bargaining unit all bargaining unit work transferred out of that unit to nonunit employees.”

3. Insert the following as paragraph 2(d) and reletter the following paragraphs.

<sup>19</sup> We have adopted the judge's characterization of the components of the bargaining unit work. We also adopt the judge's recommended remedy providing, inter alia, that the status quo be restored and the unit employees made whole for the losses they have suffered as a result of the Respondents' unlawful unilateral changes. See *Furniture Rentors of America*, 311 NLRB 749, 751 fn. 15 (1993). However, we shall leave to compliance the determination of the quantity of the Respondents' work that constitutes "unit work" for purposes of effectuating the terms of the Order. See *Owens-Brockway Plastic Products*, above, 311 NLRB at 526 fn. 19.

“(d) On request, furnish the Union with a list of customers and jobsites to which any of the Respondents have delivered concrete.”

4. Substitute the attached notice for that of the administrative law judge.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith with Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of all full-time and regular part-time drivers, mechanics, and mechanic helpers employed in the counties of Jackson, Clay, Platte, Ray, Lafayette, Johnson, Bates, Henry, and Cass in Missouri, and Wyandotte, Johnson, Leavenworth, and Miami in Kansas, excluding all office clerical employees, supervisors, and guards as defined in the Act, and all other employees.

WE WILL NOT refuse to bargain with the Union with respect to any decision to shut down the Speaker Road, Kansas City, Kansas plant, to lay off bargaining unit employees employed at such facility, or to transfer bargaining unit work from that facility to nonunit employees, and WE WILL NOT refuse to bargain with the Union with respect to the effects of any such shut-down, layoff, or transfer of bargaining unit work to nonunit employees.

WE WILL NOT unilaterally transfer bargaining unit work performed by bargaining unit employees at the Speaker Road, Kansas City, Kansas plant to nonunit employees or assign nonunit employees to perform such work, or unilaterally shut down the plant or lay off bargaining unit employees to accomplish such shut-down or transfer of bargaining unit work.

WE WILL NOT refuse to furnish the Union with information relative to its duty as bargaining agent, including, but not limited to, lists of any of the customers of any of our companies and lists of jobsites to which any of our companies have delivered concrete.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with respect to any decision to close down facilities employing bargaining unit employees, to transfer

bargaining unit work out of the unit, or to assign bargaining unit work to nonunit employees, and WE WILL bargain in good faith with the Union concerning the effects on employees of these decisions.

WE WILL offer to all employees of the Speaker Road, Kansas City, Kansas plant who were laid off on January 10, 1992, full and immediate reinstatement to their former or substantially equivalent positions, and make them whole for any loss of pay or benefits suffered by them by reason of our unlawful conduct against them, with interest.

WE WILL transfer back to the Speaker Road bargaining unit all bargaining unit work transferred out of the unit to nonunit employees.

WE WILL, on request, provide the Union with a list of customers and jobsites to which any of our companies have provided concrete.

GEIGER READY-MIX CO. OF KANSAS CITY, INC.; GEIGER READY-MIX COMPANY OF KANSAS, INC.; GEIGER READY-MIX CO. OF MISSOURI, INC.; AND GEIGER READY-MIX CO., INC.

*Mary G. Taves, Esq.*, for the General Counsel.

*Mark G. Flaherty, Esq.* and *Diane Schoemaker*, of Kansas City, Missouri, for the Respondents.

*Robert A. West, Esq.* and *Michael Arnold, Esq.*, of Kansas City, Missouri, for the Charging Party.

## DECISION

### I. FINDINGS OF FACT

#### A. Statement of the Case

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Mission, Kansas, on an unfair labor practice complaint,<sup>1</sup> issued by the Regional Director for the Board's Region 17, which alleges that Respondent Geiger Ready-Mix Co. of Kansas City, Inc.,<sup>2</sup> and

its affiliated companies violated Section 8(a)(1) and (5) of the Act. More particularly, the complaint alleges that Respondent Geiger Ready-Mix Co. of Kansas City, Inc., a unionized company, laid-off unit employees and closed its plant, relocated unit work to other affiliated entities, and assigned that work to employees located outside the bargaining unit without first notifying the Union and offering to bargain with it concerning the work relocation and plant closing. Respondents contend that they had no duty to bargain concerning the decision to close the plant in question and to relocate unit work because the decision to question was an entrepreneurial one which is not a mandatory subject of bargaining. Respondents assert that they offered to bargain with the Union over the effects of their decision, an assertion which the Union denies. The complaint also alleges that the Respondents refused to provide the Union in a timely fashion with information requested to assist it in performing its duties as bargaining agent. Respondents contends, that it did in fact provide the Union with all relevant information which was requested and refrained from furnishing only its confidential customer list. On these contentions the issues here were joined.<sup>3</sup>

#### B. The Unfair Labor Practices Alleged

All four respondent corporations in this case are owned and operated by E. W. "Bill" Geiger III, together with members of his family. The Geiger family has been in the building and construction industry and the ready-mix concrete industry for many years. At all times material to this proceeding, the Respondents operated four concrete batching plants from which trucks filled with ready-mix concrete are dispatched to a variety of construction sites, large and small. Because concrete must be delivered within an hour—and preferably within half an hour—from the time a truck is dispatched from a batching plant,<sup>4</sup> Respondents' plants are located strategically in different sections of the Metropolitan Kansas City area. Each one is owned and operated by a different corporate entity.<sup>5</sup> Geiger Ready-Mix Company, Inc. is the current corporate name of the original Geiger plant located at Leavenworth, Kansas, some 25 miles northwest of Kansas City up the Missouri River. Technically it is outside what is generally referred to as the Metropolitan Kansas City area. Until about 1989, drivers from the Leavenworth plant were under contract with Local 541 but, since the strike which took place in that year, it has operated as a nonunion facility. In 1975, Geiger opened his second plant, the one which is principally involved in this case. This plant is located on Speaker Road in Kansas City (Wyandotte County, Kansas) and is the most centrally located of the four batching plants. It was operated until January 10, 1992, as a union facility under contract with Local 541. When it opened, it was staffed with personnel who came from the Leavenworth plant. It was looked upon as an outgrowth of that plant and as an effort on the part of Geiger to penetrate the Kansas

<sup>1</sup> The principal docket entries in this case are as follows:

Charge filed by Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541, affiliated with International Brotherhood of Teamsters, AFL-CIO (Union) against Respondents on July 8, 1992; complaint issued against the Respondents by the Regional Director, Region 17, on January 15, 1993; Respondent's answer filed on January 25, 1993; hearing held in Mission, Kansas, on April 26 and 27, 1993; briefs filed with me by the General Counsel, the Charging Party, and the Respondents on or before June 14, 1993.

<sup>2</sup> Respondents admit, and I find, that they are corporations which maintain places of business, respectively, in either Missouri or in Kansas within the Kansas City metropolitan area where they are engaged in the manufacture and delivery of ready-mix concrete. In the course and conduct of this business, they annually sell and ship across state lines goods and merchandise valued in excess of \$50,000. Respondents also admit they constitute a single employer under the Act. Accordingly, the Respondents are an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

<sup>3</sup> Certain errors in the transcript have been noted and corrected.

<sup>4</sup> Concrete which is unduly delayed in transit becomes "hot" and is unusable. Under Missouri law, contractors are forbidden from pouring concrete which has arrived at a building site more than an hour after it has left the batching plant.

<sup>5</sup> Geiger is the major stockholder and operating chief of each corporation.

City market. The Speaker Road facility was selected because of its proximity to two interstate highways which provide trucks dispatched from that batching plant with quick access to relatively remote building sites throughout the Kansas City area. It is known as Geiger Ready-Mix Co. of Kansas City, Inc.

In the 1970s the Geiger family acquired another batching plant at Liberty, Clay County, Missouri, in the northeast quadrant of the Metropolitan Kansas City area. That plant was operated as a union facility under contract with Local 541 until 1989 when, following a strike, it also became non-union and began to operate as Quality Concrete of Missouri, Inc. It carried that name until 1992, when it was changed to Geiger Ready-Mix Co. of Missouri, Inc. In the 1970s a fourth plant was opened in the southwest quadrant of the Metropolitan Kansas City area at Lenexa, Johnson County, Kansas, on a rented tract of land which included a quarry. Lenexa has always been a nonunion facility and operated as Quality Concrete, Inc., until 1992, when its name was changed to Geiger Ready-Mix Co. of Kansas, Inc. For ease of recognition, these plants will be referred to as the Leavenworth, Speaker Road, Liberty, and Lenexa plants, respectively.<sup>6</sup>

Since 1989, the Speaker Road facility has been the only unionized portion of the Geiger holdings. For more than 15 years, collective-bargaining contracts with Local 541 have been negotiated by Geiger covering this plant through either the Builders Association or later, the Concrete Producers Association, a multiemployer association composed of approximately five unionized concrete producers in the Metropolitan Kansas City area. The most recent contract began on April 1, 1991, and expires on March 31, 1994. It was in effect during the events at issue in this case and covers a bargaining unit described as follows:

The jurisdiction of this Agreement shall extend to and include the counties of Jackson, Clay, Platte, Ray, Lafayette, Johnson, Bates, Henry and Cass in Missouri, and Wyandotte, Johnson, Leavenworth and Miami in Kansas.

The job classifications covered by this contract included mixer-truck drivers, material-truck drivers, truck mechanics, and truck mechanic helpers. The Respondent also had contracts with an Operating Engineers Local covering two operating engineers employed at Speaker Road and a contract with a Laborers' Local covering a laborer employed at Speaker Road. There is no dispute in this case involving either Operating Engineers or Laborers, although individuals employed in those classifications were laid off at the same time that 24 drivers and mechanics subject to the Local 541 contract were laid off.

<sup>6</sup>On December 3, 1991, before the events at issue in this case took place, Geiger notified his employees in writing that, as of January 1, 1992, he would cease doing business at Liberty and Lenexa under the Quality Concrete name and would use the Geiger Ready-Mix title for operations at those facilities. However, this change in names did not take place until sometime in the spring of 1992. The asserted reason for the change in names was that "Geiger Ready-Mix certainly gives us an edge over many of our competitors in name recognition and reputation for service and quality."

In 1991, the last full year that the Speaker Road plant operated as a union facility, drivers from that plant delivered 78,000 cubic yards of concrete to both unionized and non-union jobsites. By far the largest share of these deliveries, some 55,000 cubic yards, were delivered to unionized construction sites, but about 23,000 cubic yards were delivered by its union drivers to nonunion sites. Unionized construction sites typically involved either large commercial and residential buildings, such as office and apartment buildings or warehouses and road and bridge construction.<sup>7</sup> Much of it is so-called bid work, requiring the Respondents to submit competitive bids against other companies in order to get the work. Nonunion orders typically involved small commercial or residential work, such as single-family homes and housing developments. This concrete is sold at quoted rates, depending upon the mix,<sup>8</sup> and is normally quoted at rates considerably higher than those which are successfully bid on larger unionized jobs. Union drivers at Speaker Road normally obtained their concrete at the Speaker Road facility. However, Local 541 did permit them to obtain loads prepared by non-union labor at the Lenexa and Liberty plants whenever it was more efficient to do so, in order to serve the needs of customers and to avoid travelling great distances without a load. Nonunion drivers from Lenexa and Liberty were not allowed to obtain loads at Speaker Road. However, they did deliver concrete from time to time to unionized or heavy and high-way jobs. The only limitation on their activity in this regard was the reluctance of some unionized contractors to accept deliveries of concrete in trucks driven by nonunion drivers. Occasionally, Local 541 picketed union jobsites with "area standards" signs when nonunion drivers regularly appeared.

In the fall of 1991, the Respondents reorganized and centralized the management of their plants. Managers of all four plants were stationed at the Respondents' main office, located adjacent to the Speaker Road plant in Kansas City, Kansas, and were given general duties, such as truck purchasing or estimating, which touched upon the functions of all the Respondents' facilities, in addition to oversight responsibilities at an individual plant. Salesmen located at each plant then provided immediate onsite supervision. Of considerable importance in the operation of all of these facilities is the fact that, both before and after the 1991 reorganization, the dispatching of trucks originating from all facilities was centralized at Speaker Road. These dispatches were made by phone or radio by one dispatcher whose dispatch decisions

<sup>7</sup>The record contains repeated and unchallenged assertions that 60 percent of the Speaker Road customers were unionized and 40 percent were nonunion. This figure must necessarily refer to a nose count of individual customers since the delivery figures, noted above, show that 70 percent of the 1991 Speaker Road deliveries, by volume, went to unionized contractors.

<sup>8</sup>Ready-mix concrete is composed of cement, various types of sand, rock, and water, which is mixed together at the plant in various proportions, depending on the requirements of the order and the purpose for which the concrete is being poured. These formulas are adjusted by computer; the price charged depends on the proportion of concrete to other ingredients and the type of sand and rock used. Literally hundreds of different mixes can be prepared. The completed "batch" is then dropped into a delivery truck having a rotating drum and is dispatched promptly to a jobsite, where it is poured in conformity with the instructions of the contractor's foreman. On rare occasions, customers will come to the batching plant and carry away a small amount of concrete in their own trucks.

were made on an individual, ad hoc basis each day for the Respondents' entire operation. Those decisions depended on a variety of factors, such as the location of the construction site and the availability of trucks, at any given moment at any particular facility, to fill an order which had just come in. Such centralized dispatching meant an interchange of deliveries among the four plants with regard both to particular jobs and particular customers. As noted above, the only limitation on dispatching Lenexa and Liberty drivers was that they could not be sent to union jobsites where contractors refused to accept nonunion deliveries.

In December 1991, Respondents' management decided to close the Speaker Road facility. However, it did not disclose this decision until the morning of January 10, 1992. On that date, it called all of its hourly rated employees to the plant to an early morning "safety meeting"<sup>9</sup> attended also by Geiger, his management staff, and Mark G. Flaherty, his attorney. Geiger notified the Speaker Road employees that the plant was being shut down immediately for an indefinite period of time. A memo to all employees was distributed which read:

Effective today, January 10, 1992, we are shutting down Geiger Ready-Mix Co. of Kansas City, Inc., for an indefinite period of time and laying off all of our employees. As you all know, this operation has not been profitable lately and demand and price for union ready mix has decreased markedly over the last few years. If the situation changes, we will restart this operation and call employees back as provided in the various union contracts. We know that this will work a hardship on our employees and we are very sorry that we must take this action. We will be happy to provide you with a letter of recommendation to assist you in seeking new employment.

Those of you who are covered under union health and welfare plans will be notified by those plans as your eligibility for health and welfare benefits is affected. Those plans will furnish you with information on how to continue your participation in health and welfare benefits as required by federal law.

For those of you working under the Laborers and Operating Engineers contracts, your vacation contributions have been sent to the Funds. Employees working under the Teamsters contract are receiving their accrued vacation pay in their paychecks for time worked.

<sup>9</sup>There were 25 drivers, mechanics, and batchmen on the Speaker Road payroll who were laid off at this time. They were: William Abbott, Leon Beck (batchman), Eric Cartwright (laborer), Robert Cox, Larry Earl, Keith Garnett, Larry Gatlin, Earl Guliford, Virgil Gumm, Leroy Harris, Thomas Heddens, Jerome Hundley, Frank Jones, Harold Kelly (mechanic), Terry Lalicker, Salvador Magana (batchman), Steve Maidment (batchman), Randy Massengale (mechanic), Joe McDonough, Richard Parrett, Billy Patton, Jerry Puckett, James Simmons, Russell Thogmartin, and Edward Woodward. (All of the above-named employees are drivers except where otherwise indicated.) Almost all attended this meeting. Because of the seasonal nature of the Respondents' business, those in the bottom half of the seniority list were not working regularly. Union fringe benefit reports received from the Respondents for the payroll period which included January 10 reflected that, during their final week, seven unit employees worked either 1 hour or no hours, four worked between 5 and 20 hours, and eight worked more than 20 hours.

All of you will receive your final paycheck for all hours worked through yesterday and your show-up pay for today. The drivers will also be paid their accrued but unused vacation pay through today.

Again we hope that the business climate will improve but we cannot justify keeping the company open at its current level of profitability. If business potential improves, we will reconsider the options. However, at this time, that does not appear very likely.

Drivers at the Speaker Road plant were regularly assigned to drive a particular truck, which bore not only the company name and number but also the name and the safety record of the driver in question. Drivers frequently kept personal belongings, such as radios, tools, or clothing, in their trucks. On the morning of January 10, these items had been placed in individual boxes and were given to drivers as they departed.

At the conclusion of the meeting, Flaherty phoned the union hall and asked to speak with Robert Gillihan, the Local 541 president and the business agent who had handled the Geiger account for the Union for several years. The call arrived at 7:30 a.m., half an hour before the Teamsters office normally opened, and was taken by Fred Fisher, the Union's secretary-treasurer and business agent, who had arrived for work early. Flaherty told Fisher that he wanted to give Gillihan notice that the Speaker Road operation was being closed that day and that all of the Teamsters-represented employees had been laid off. Fisher said that he would relay the information to Gillihan when the latter arrived for work and he did so. By the time Gillihan reached the Teamsters office, laid-off employees from the Speaker Road plant were arriving to give him the same information.

On January 10, Geiger wrote Local 541 and the two other labor organizations with whom the Respondents had a contract the following letter:

This is to notify you that effective January 10, 1992, Geiger Ready-Mix Co. of Kansas City, Inc., is shutting down operations for an indefinite period of time and laying off all of its employees. The company will continue to be bound by its collective bargaining agreement with your union and, should the business climate change and the company determines to restart operations, it will comply with all of the terms of the collective bargaining agreement in recalling employees from layoff. However, at this time, it appears that the shutdown and layoffs will last for several months, at the end of which the company will reassess its options.

We will, of course, notify you of any decisions that are made that will affect employees who are covered by our collective bargaining agreement with your organization.

During the ensuing hours of the business day on January 10 and for sometime thereafter, Geiger and other management personnel were busy notifying Speaker Road customers of the shutdown. In these conversations they informed their customers of an option of obtaining union-made and union-delivered concrete from other union suppliers. They also informed these customers that the Geiger operations at Liberty and Lenexa (and presumably at Leavenworth as well) stood

ready to complete existing contracts and to supply the needs of these customers from its other plants.

As more fully detailed, *infra*, on January 10, the Speaker Road facility was obligated to make deliveries to several ongoing projects and did so with trucks dispatched from the Liberty and Lenexa plants. It also used Lenexa and Liberty drivers to deliver concrete to jobsites at which contractors had agreements, either formal or informal, to obtain concrete from Speaker Road but whose projects had not come on line as of January 10. In the next few weeks, nonunion drivers from Liberty and Lenexa delivered concrete batched at those plants to previous Speaker Road unionized customers such as Tomahawk Construction, DiCarlo, Leavacon, Browner Associates, C. L. Fairley, J. E. Dunn, and Foley. They attempted to deliver to a union job being performed by Grisson and Stakes at the Quindaro Power Plant but the contractor would not accept the deliveries because of the presence of pickets carrying "area standards" signs.

Batching operations at Speaker Road were discontinued for a period of 4 or 5 weeks and then were resumed. I credit the uncontradicted testimony of Teamsters-represented truck mechanic Harold Kelly, who was laid off on January 10, that he visited the Speaker Road facility a few weeks after the layoff and observed a truck mechanic who had worked in the shop as a strike replacement some years before employed as a mechanic and working on a truck which Kelly had been repairing at the time of the layoff.

Sometime late in February 1992, title to all the assets, movable and immovable, at the Speaker Road plant was transferred from Geiger Ready-Mix of Kansas City, Inc., the employer of the laid-off drivers and mechanic, to Geiger

Ready-Mix, Inc., the corporation which operated, and continues to operate, the Leavenworth facility. However, the centralized control of all operations remained at the central office on Speaker Road. A few of the Respondents' Speaker Road trucks were transferred to other locations, some sat unused for a time at the Speaker Road yard, and a few, which were in bad condition, were sold.

Beginning in March 1992 Geiger Ready-Mix, Inc., the Leavenworth corporation, reopened the batching operation at Speaker Road and began to deliver concrete from this location. During the course of 1992, the Respondents hired a large number of new employees. Two mechanics and a laborer were specifically hired for the Speaker Road facility. Fourteen drivers were hired for Leavenworth, 13 drivers for Lenexa, and 8 for Liberty. While trucks assigned to the Speaker Road facility had been farmed out to other locations, many were brought back, along with drivers, from those locations and new trucks were purchased for all locations.<sup>10</sup> By the end of 1992, the Respondents had approximately 15 drivers assigned, at least on paper, at each of three locations other than Speaker Road. However, many operated out of Speaker Road, some on an occasional basis and some on a semipermanent basis. At the time of the hearing in this case, the totality of the Respondents' operations employed approximately the same number of drivers that they had on the date of the January layoff. In 1992 the Speaker Road facility produced, as an almost totally nonunion operation, some 21,021 cubic yards of concrete. Of that figure, only 964 cubic yards had been produced before the layoff. A comparison of the production at the Respondents' four locations between 1991 and 1992 reveals the following figures:

| <i>Plant</i>                    | <i>1991 Yardage</i> | <i>1992 Yardage</i> | <i>Difference</i> |
|---------------------------------|---------------------|---------------------|-------------------|
| Leavenworth                     | 61,569 cu. yards    | 62,648 cu. yards    | +1,079 cu. yards  |
| Liberty (Clay Co.)              | 60,497              | 79,531              | +18,834           |
| Speaker Road<br>(Wyandotte Co.) | 78,203              | 23,788              | -44,415           |
| Lenexa (Johnson Co.)            | 27,179              | 61,332              | +34,153           |
| Total                           | 227,400 cu. yards   | 227,200 cu. yards - | 200               |

In April 1993, some 12 to 14 trucks were operating out of the Speaker Road plant, as compared with 25 at the time of the layoff. Four of these trucks are new vehicles purchased by the Respondents following the layoff. Eight are vehicles normally assigned to the Lenexa plant which were moved to Speaker Road in the fall of 1992 when the Respondents received a letter from the city of Lenexa, dated September 23, 1992, notifying them that the business of Praik Mining and its lessees, including Geiger and another, should cease as a result of a foreclosure action brought apparently by a mortgage holder of the property. At the time of the hearing, the Respondents were servicing Lenexa cus-

tomers from Speaker Road. Along with other drivers, these relocated Lenexa drivers were also making deliveries to both union and nonunion customers who had historically been served by union drivers from Speaker Road. Notwithstanding the threat of the city of Lenexa to seek injunctive relief for a refusal to terminate the Lenexa operation, Respondents have, up to the time of the hearing in this case, continued the Lenexa operation with approximately six of the Respondents' trucks being regularly assigned to that location. Respondents hope eventually to relocate the Lenexa facility further out from the center of the Metropolitan Kansas City area to Olathe, the county seat of Johnson County, but that relocation has yet to occur.

On March 24, 1992, Gillihan wrote Geiger an eight-page letter making a detailed request for information relating to

<sup>10</sup>The Speaker Road trucks which bore the names and safety records of laid-off unionized employees were repainted to eliminate those markings. Likewise, the Quality Concrete trucks formerly in use at Liberty and Lenexa were repainted to remove the Quality

Concrete designation and to replace it with the Geiger Ready-Mix name. All trucks now operated by the Respondents from any location bear the same marking—Geiger Ready-Mix.

the operations of Geiger Ready-Mix Co., of Kansas City, Inc., as well as the corporate structure and interrelation of that company with its affiliated companies. On or about April 6, Gillihan, Geiger, and their respective attorneys held a breakfast meeting at a local restaurant at which they discussed the requested information. Geiger agreed to provide the Union information relating to the corporate structure of the Respondents and their interrelation. However, he flatly refused to provide any customer lists or any list of jobsites which were being serviced by any of the Respondents' trucks. On May 14, Flaherty, acting on Geiger's behalf, sent Gillihan a detailed written reply to the March 24 letter, responding paragraph by paragraph, in which much of the requested information was supplied. However, Flaherty did not supply the names of the Respondents' customers or the jobsites at which his client was supplying concrete. It should be noted that, during the course of this proceeding, much of the information relating to the Respondents' customers and to jobsites served by the Respondents was given to the Board, either in the course of the investigation of the charge herein or in response to subpoenas served prior to the hearing.

On October 29, Geiger wrote Gillihan a lengthy letter in which he stated, *inter alia*, "I believe it is time for the Company to make a decision whether to make the temporary plant closing permanent. . . . The only way I can compete for bid jobs, and make any money on other union jobs, would be to lower my costs significantly, since I cannot make any money by selling the cement as Ash Grove and LaFarge do."<sup>11</sup> He went on to state, "Absent some way to make it profitable, I am ultimately going to have to shut it down permanently. While it does not appear that you have any 'give' to your longstanding position about labor rates and benefit contributions, and while you can't do anything about the competitive climate or cement prices, I will be happy to listen to any ideas you may have with regard to the future of the plant. Please call me so that we can set up some time to discuss the issue and, if necessary, to negotiate about the decision to close the plant permanently." On December 4, Gillihan sent Geiger a lengthy reply in which he stated:

"You have asked for my suggestions on what to do about the Speaker Road facility and have threatened to close it permanently. My suggestion is simple—Geiger should abide by its current collective bargaining agreement with Local 541 and utilize its former employees to operate the Speaker Road facility instead of using non-union employees of other companies to perform the work. . . . Your offer to negotiate regarding a decision to close the plant permanently is meaningless, given the fact that you have transferred all bargaining unit work to your non-union employees since January 1992."

<sup>11</sup> Ash Grove and LaFarge were, and are, two unionized competitors, each of whom owns both a cement producing company and a ready-mix delivery company which sells directly to contractors. It is the contention of the Respondents that the vertical integration of these operations placed its unionized company at a considerable competitive disadvantage in bidding large union jobs because it did not obtain cement from an internal source but had to purchase it on the open market. The cost of cement is a major component in the cost of producing ready-mix concrete.

### C. Analysis and Conclusions

#### 1. The defense of limitations

Before reaching the merits of this case, two peripheral questions must be addressed briefly. The Respondents contend that the complaint is barred by Section 10(b) of the Act because the charge was filed on June 8, 1992, some 180 days after the January 10 layoffs, and was not served on the Respondents until June 10, some 182 days after the event about which the General Counsel complains. Accordingly, they argue that, since a charge must be both filed and served within the 10(b) period, it is defective so the complaint which arose out of it must be dismissed.

In fact, the charge was filed on June 8 and placed in certified mail on the same date. The domestic return receipt in the record reflects that the charge was received by the Respondents on June 9, not June 10. The Board has held, with court approval, that the date of mailing of a charge by a regional office to a charged party is the date of service, and a charge is timely filed and served if done so within 6 months, even though the charge might not have reached a charged party in the mail until some date beyond the 10(b) period. *Laborers Local 264 (D & G Construction Co.)*, 216 NLRB 40 (1975), *enfd.* 529 F.2d 778 (8th Cir. 1976). Accordingly, the charge herein was both filed and served in a timely fashion, even by the Respondents' reckoning. However, the Respondents' contention respecting limitations must fail on other grounds as well. The limitation set forth in Section 10(b) of the Act is a 6-month limitation, not a 180-day limitation. In this case, the 6-month period expired on June 10, not June 8. Accordingly, the charge herein was timely since it was filed, served, and received before that date.

#### 2. The effect, if any, of the Worker Adjustment and Retraining Notification Act of 1988 (WARN)

The Respondents also contend that the complaint in this case must be dismissed because of the provisions of the Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. § 2101, *et seq.* That Act was passed by Congress in 1988 to require certain employers who are contemplating plant closures to give their employees a 2-month notification of their proposed action, something which did not occur here. The Respondents contend that WARN preempts the provisions of the National Labor Relations Act (NLRA) so any prosecution of an employer under the NLRA for a plant closing violation must defer to the procedural remedies set forth in WARN. The simple answer to that contention is that the provisions of WARN apply only to employers of 100 or more employees. 29 U.S.C. § 2101(a)(1)(A). The Respondents herein employed only 25 employees in the Speaker Road bargaining unit and far less than 100 in their entire organization. Accordingly, WARN does not even apply to the Respondents herein by its own express provisions.

Secondly, section 8 of WARN states that "the giving of notice pursuant to this Chapter, if done in good faith compliance with this Chapter, shall not constitute a violation of the National Labor Relations Act or the Railway Labor Act." 29 U.S.C. § 2108. Such language clearly suggests an intention on the part of Congress that the provisions of WARN should be read together with the provisions of the NLRA, as well

as the Railway Labor Act, that it does not preempt either of those statutes, and that the provisions of all three statutes should be read together to give maximum effect to each of them. Accordingly, the Respondents' contentions in this regard must also be rejected.

3. The closing of the Speaker Road plant and the transfer of bargaining unit work to nonunit employees without notification and bargaining

The Supreme Court long ago held that the subcontracting of bargaining unit work to another employer is a mandatory subject of collective bargaining and may not unilaterally be accomplished without first notifying the bargaining agent of the affected employees and giving them an opportunity to bargain about the transfer. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). This obligation exists whether the subcontracting is to another company, as in *Fibreboard*, or whether the proposed transfer is an in-house relocation of work from a represented bargaining unit to some other group of employees employed by the same employer. *Connecticut Color*, 288 NLRB 699 (1988). The mandatory nature of such bargaining exists in such situations because, as the District of Columbia pointed out in the second *A-1 Fire Protection* case, the allocation of work to a bargaining unit is a term or condition of employment within the meaning of Section 8(d) of the Act and may not be unilaterally diverted. *Road Sprinkler Fitters Local 669 (A-1 Fire Protection Co.) v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982). See also *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981). Even when, under exceptional circumstances, a decision to close a plant and transfer bargaining unit work elsewhere may be excused from the general mandate of Section 8(d), an employer must still bargain in good faith with its employees' bargaining agent over the effects of such a transfer. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Even though a bargainable action is taken by an employer for purely economic reasons, a duty to negotiate about it exists, since violations of Section 8(a)(1) and (5) of the Act arising out of unilateral actions are not necessarily predicated on a finding of animus or discriminatory intent and normally presume that the reason for an employer's disputed action is an effort to achieve some kind of economic advantage or benefit.

In this case, there is no dispute that, in deciding to close its Speaker Road plant on January 10, 1992, and to lay off 25 bargaining unit employees, the Respondents did not offer to bargain with the Union and did not in fact do so before making the decision. To excuse their failure, they claim the benefit of an exception to the general rule relating to bargaining over plant closure, layoffs, and transfer of unit work found in *First National Maintenance*, supra, and its progeny. These cases hold that, as to the decision to lay off employees and close a plant, there is no duty to bargain under Section 8(d) if an employer's action is prompted solely by entrepreneurial concerns related to a change in the direction and scope of its business. In such circumstances, a decision to close all or a part of a business, as well as consequent layoffs and transfer of work, may be undertaken unilaterally, so long as labor costs are not a factor which prompted the change or, if such costs were a factor, circumstances were such that the union involved could not have offered cost con-

cessions which would have changed the employer's decision to relocate. *Dubuque Packing Co.*, 303 NLRB 386 (1991).

Before examining the factors supporting the Respondents' claim that it was solely exercising entrepreneurial discretion aimed at changing the scope and direction of its enterprise, it would be well to examine first of all what in fact occurred on January 10, 1992, and thereafter, as well as just what constitutes the bargaining unit work which the General Counsel says was illegally diverted. In announcing the layoff to its employees on January 10 and in notifying the Union of its action, the Respondents asserted that the layoff in question was "indefinite." In the course of this litigation, the term "indefinite" became "temporary." In its view, the permanent decision to close the Speaker Road plant did not take place until many months later, when Geiger wrote Gillihan a letter offering to bargain over the "permanent" decision. Interestingly, the Respondents, though arguing that the decision to close "temporarily" was not subject to the 8(d) duty of notification and bargaining, were apparently willing to acknowledge that their decision to close permanently, brought to the Union's attention after the charge in this case was filed, might actually be a mandatory subject of bargaining. However, as Gillihan pointed out in his reply, by that time the Union's bargaining strength had been so decimated by the layoff that bargaining would have been futile.

While the Respondents may have characterized the January 10 layoff in question as indefinite, it was in fact permanent and was intended to be such from the very outset. None of the 25 unit employees who were terminated that day ever worked again for the Respondents. Within 6 weeks after the layoff, Respondent Geiger Ready-Mix of Kansas City, Inc., the unionized component of this family enterprise, had sold all of its assets and had transferred them to sister corporations, principally the corporation which operated the Leavenworth facility. This transfer included the Speaker Road batching plant and approximately 24 trucks which had been used to make deliveries from that plant. The names and driving records of the laid-off drivers—marks which had identified them personally with their vehicles—were removed and all of the Respondents' vehicles, wherever domiciled, were repainted with the same logos, thus making them indistinguishable one from the other. The names of the nonunion companies and their facilities were changed to accommodate a single identification of all Geiger companies in the public mind. By the time the Speaker Road facility had reopened early in March, Geiger Ready-Mix of Kansas City, Inc., the corporate entity which had operated a unionized ready-mix company and which technically still had a contractual relationship with the Union, was a corporate shell having no assets and no employees. It has remained as such since that time. Its total demise was merely formalized late in 1992. Both at the layoff meeting and at the hearing in this case, Geiger left himself a small opening, telling his employees and the Board that he would have recalled some of the union drivers if he had received a large bid job from a union contractor. However, he never made any such bids in order to obtain this type of work and sold concrete to union contractors only when such work came his way on a quotation basis. The suggestion that he might recall drivers in some circumstances and under certain contingencies was, when translated into practical terms, a statement that he would use unionized drivers if a customer insisted on such deliveries for

fear of inciting "area standards" picketing by the Union herein. However, that eventuality never arose. From what Geiger did, as distinguished from asserted intentions lingering privately in the recesses of his mind, it is clear that the layoffs he made on January 10 were permanent layoffs and that they were intended as such from the very outset of the course of action which he took. Accordingly, the posthumous offer which Geiger Ready-Mix of Kansas City, Inc., made in October to bargain over a decision to close permanently was merely a cosmetic effort to achieve some colorable compliance with the law.

While the Speaker Road layoffs of January 10 were permanent, the Speaker Road plant closing was not. Indeed, the plant was up and running by early March and is still in operation, although under the aegis of another of the Geiger family corporations and perhaps not on the same scale as in 1991. Concrete is being batched; approximately 14 trucks are delivering it to a host of locations, and they continue to be dispatched on a centralized basis along with trucks domiciled at other locations. Moreover, trucks are still being maintained and repaired in its shop. In light of these undisputed facts, it is very questionable what Geiger meant when he wrote Gillihan on October 29 offering to bargain about a decision to make a temporary plant closing permanent. The Speaker Road facility was producing concrete then and it is producing concrete now, and there is no credible evidence in this record that the Respondents have any intention whatsoever of actually terminating this operation.

Since the allocation of bargaining unit work is, with the exceptions noted above, a mandatory subject of bargaining, there must first be some determination of what that work was in order to ascertain whether or not a violation has occurred. This determination is complicated by the fact that the bargaining unit description in the contract between the Union and the now-defunct Kansas City corporation was inartfully drawn. The contract states that the jurisdiction of the agreement extends to 13 named counties in Kansas and Missouri. The section on wage rates sets forth the wage scales for four classifications of employees—two classes of truckdrivers, mechanics, and mechanics helpers. The union-security article states that the Company recognized Local 541 as the exclusive representative "for all its employees within the jurisdiction described in Article III hereof who are employed by the Company to work in the job classifications listed in Section 1 of Article VI hereof." Since only unionized drivers from Speaker Road were entitled to deliver concrete batched at that plant, it is clear that bargaining unit work included all concrete customarily batched and delivered from that point, regardless of whether it was delivered to union or nonunion jobsites. Unionized drivers from Speaker Road were also assigned, and were permitted by union officials, to make deliveries of concrete batched at Lenexa and Liberty to any convenient jobsite and in fact they did so. Beginning in 1987, all of these deliveries, as well as all of the deliveries made by Lenexa and Liberty drivers, were dispatched from a central location and, as noted previously, the only practical limitation on those daily dispatching decisions was that nonunion drivers could not be sent to any jobsites where union contractors would refuse to take a nonunion delivery. Some union contractors refused such deliveries and others did not. Within that broad parameter, the location of the job and the

availability of trucks at any particular plant were the factors which controlled dispatching decisions.

In setting forth the causes of its financial predicament and the factors which prompted it to close its unionized facility, the Respondents painted a picture of the concrete business in the Metropolitan Kansas City area which, at best, only partially conformed to record evidence. According to the Respondents, there were basically three markets—the unionized "bid" work on large buildings and highway construction, unionized nonbid or quoted work, and nonunion small commercial and residential work which was also supplied on a quotation basis. However, as far as defining unit work at Speaker Road vis-a-vis the other facilities, this description of the market by the Respondents by no means provided a hard and fast delineation of the work actually performed by the respective groups of their drivers. Data from the Respondents' records placed in evidence by the General Counsel establishes a substantial overlapping of customers who were supplied from the Speaker Road, Lenexa, Liberty, and Leavenworth locations. In 1991, some 31 customers, to whom Speaker Road drivers delivered over 46,000 cubic yards of concrete, also received concrete from one or more of the Respondents' other plants and in some instances in very substantial amounts. (See G.C. Exhs. 12(a) and (b).)

In the first 5 months of 1992, despite the diminished activity of the Speaker Road plant following the January layoff, drivers from Speaker Road made deliveries of 2658 cubic yards of concrete to a total of 22 contractors who were also supplied by Respondents' drivers from other locations. As might be expected, the amounts provided by Lenexa, Liberty, and Leavenworth drivers during that period of time were much the larger share of the total deliveries. As noted above, in 1992, the Respondents delivered, in toto, almost as much concrete as they delivered, in the aggregate, in 1991 when the Speaker Road plant was fully functioning. This occurred because the amounts delivered from Liberty and Lenexa increased dramatically. In 1991, the 78,200 cubic yards delivered from Speaker Road constituted approximately 34 percent of the total of 227,400 cubic yards of concrete delivered from all of the Respondents' locations during that year. In light of these factors, a proper definition of unit work at the Speaker Road plant on January 10, 1992, would be 34 percent of the Respondents' total deliveries of concrete, in addition to sufficient batching work to employ the batchmen and two mechanics. It is this unit work which is at issue in this case.

In my opinion, even if *Dubuque Packing*, supra, were applicable, the exemption provided by *Dubuque Packing* and *First National Maintenance* supra, for bargaining over the decision to shut down a plant and relocate unit work is unavailable to the Respondents in this case for two reasons. First of all, the exemption from bargaining provided by these cases applies only to permanent plant shutdowns, not to temporary shutdowns, because permanent change in the direction and scope of an enterprise can hardly be said to exist where a plant shutdown is only temporary in character. In this case, the January 10 shutdown lasted only 4 or 5 weeks. Thereafter, the plant was reopened and operated by management and other nonbargaining unit personnel. Deliveries began to be made, and are still being made, by nonunit drivers, most of whom are technically assigned to other locations but work out of Speaker Road. Second, the rationale of *Dubuque*

*Packing* and *First National Maintenance* cannot be called into play where the shutdown, layoff, or relocation of work is prompted by labor costs. It is clear in this case that labor costs were the driving force which propelled the action the Respondents took on January 10. Indeed, when Geiger was pressed to cite some reason other than labor costs which influenced the shutdown and layoff decision, he could speak only generally in terms of geography. However, the Speaker Road plant is the hub of the four plants which the Respondents operate. The site was selected at the outset because of its proximity to interstate highways providing its trucks with easy and fast access to a wide range of jobsites and is still being utilized to make a host of concrete deliveries in the daily dispatching decisions in the Respondents' centralized operation. When asked why the Respondents did not lay off employees from one of their nonunion plants and move Speaker Road bargaining unit employees to one of those locations, Geiger had no answer, responding only that such a move was never even contemplated. Since the hourly labor cost at Speaker Road was about \$4-\$6 higher than at any of the nonunion operations when the cost of fringe benefits was figured in, it is clear that the January 10 closing and layoff was solely a labor cost related move and, as such, was not exempt from the duty to bargain set forth in Section 8(d) of the Act and explicated in the most recent of the *Dubuque Packing* decisions.

To the labor cost exception to the *Dubuque Packing* rule, there is a further exception which allows an employer, who shuts down a plant or a section thereof and lays off all or part of a bargaining unit, to assert that it had no duty to bargain, notwithstanding the fact that labor costs were the primary factor in its decision, if "the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." *Supra*. To bring itself under this exception to the labor cost exception, an employer must offer something more than a self-serving assertion that there was nothing the bargaining agent of its unionized employees could do to change its mind. In this case, during the 1989 bargaining and the strike which attended those negotiations, the Union agreed to a wage rate several dollars less than what its members had been receiving during the previous contract term. During the 1989-1992 contract term, in response to the employer's ongoing complaint that the lower contractual wage rates were still making it uncompetitive in a portion of its market, the Union agreed to a requested modification of contract terms which gave the Respondents two wage rates, one for deliveries in the union market and another for deliveries in the residential or nonunion portion of the market. When this modification, requested by Geiger, proved to be unworkable, it agreed to a further modification for a "blended" wage rate of \$13.50 an hour. When Geiger complained that its Speaker Road trucks were running empty because of a union rule forbidding union drivers to receive loads of concrete at nonunion batching plants, the Union modified this rule and permitted its members to load up at Lenexa and Liberty to avoid running empty over long distances. Far from being indifferent or insensitive to Geiger's business problems, the Union herein has had a long track record of making economic concessions to assist the Respondents in competing in all of its markets. However, no "give-backs" were ever enough and, for its trouble, the Union and its members found themselves literally out in the

cold one January morning as the result of a unilateral decision which was *surreptitiously* made and concealed from them until the last possible moment, when any effort toward meaningful negotiations would have been pointless. Leaving aside the bargaining history and the equities of this situation, to the Respondents' contention that there was nothing the Union could have done to relieve the economic distress in which the Respondents purportedly found themselves in late December 1991 and its claim to fall within the exception to the exception found in the *Dubuque Packing* rule, the simple answer is that the Union was never asked. It is plain that the January 10 action by the Respondents herein was not an entrepreneurial decision aimed at changing the scope and direction of the enterprise.<sup>12</sup> It was a cost-cutting exercise aimed at replacing higher priced drivers with lower priced drivers. As such, the activity did not come within the ambit of *First National Maintenance* and *Dubuque Packing*. See *Mid-State Ready Mix Co.*, 307 NLRB 809 (1992). Accordingly, by deciding to close its Speaker Road facility temporarily and to lay off its Speaker Road bargaining unit employees permanently without first notifying the Union and offering to bargain with it concerning the decision, the Respondents herein violated Section 8(a)(1) and (5) of the Act.

The loss of bargaining unit work at Speaker Road was not the result of impersonal market forces bearing down upon a hapless employer who found itself in a desperate, last-ditch fight to rescue its business. It is true that the number of bargaining unit hours worked by Speaker Road employees in 1991 was less than the number of hours worked the previous year (30,809 vs. 41,714). However, the 1991 figure exceeded the number of hours those employees worked compared to 1985 (30,809 vs. 25,709), when, according to the Respondents' view of business conditions, the concrete industry in the Kansas City area was a level playing field and all unionized contractors could compete with each other and still prosper. Bargaining unit work at Speaker Road was not a sharply defined, highly structured, and discrete segment of the Respondents' total concrete production. It was a percentage of an interchangeable or "fungible" commodity<sup>13</sup> produced throughout all of the Respondents' plants and, in 1991, it was the largest percentage. Both before and after the January 10 layoff, the Respondents had the power, within broad limitations, to adjust that percentage and, following the layoff, that is just what it did. As production at Speaker Road dropped dramatically, production and delivery of concrete at its other locations increased to offset that decline. I conclude that, by transferring a significant portion of the bargaining unit work from Speaker Road to be performed at other locations or by employees assigned to other locations who obtained their loads at Speaker Road, without the necessary notice and bargaining and in order to accommodate its plan to

<sup>12</sup>One of the usual factors found in purely entrepreneurial decisions exempt from bargaining is a reallocation of capital from one facet or phase of an employer's enterprise to another facet of its activity. Here there was no such capital reallocation. Respondents sold a few old trucks and bought a few new ones, but they were used to do the same work, in the same market, and from the same source of concrete as in the pre-January 10 operation.

<sup>13</sup>There has never been any contention that the kind or quality of concrete batched at Speaker Road differed in any respect from the kind or quality of concrete batched by the Respondents at any of their other plants.

shut down Speaker Road and eliminate all unit employees, the Respondents herein violated Section 8(a)(1) and (5) of the Act.

As noted before, even under the strictures of *First National Maintenance* and *Dubuque Packing*, an employer who may lawfully close its plant without notification and bargaining with the representative of plant employees must still give the employee representative an opportunity to bargain meaningfully concerning the effects of such actions on unit employees. The Respondents' efforts in this regard barely rose to the level of perfunctory. The duty of notice and bargaining requires such bargaining before the decision is implemented, when a union still has some bargaining strength at its command, unless there is an emergency situation not present in this case.<sup>14</sup> *Metropolitan Teletronics*, 279 NLRB 957 (1986); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Chrissy Sportswear*, 304 NLRB 988 (1991). In this case, Flaherty did not call the Union to announce the company action until after the layoff had been accomplished and then all that he did was to ask the individual who answered the phone at the union office to transmit his message to the official who was responsible for dealing with the Respondents. Nowhere in this message, or in the written letter which followed, was there an offer to bargain over effects. After the Union filed its request for information, the parties met and discussed the request at hand. I credit Gillihan's testimony, supported by Geiger's pretrial affidavit, that no discussion of the effects of the layoff took place during this meeting. The conversation related strictly to the information request and to casual conversation about the good old days in the concrete industry. Having failed to engage in meaningful bargaining over the effects of the shutdown and layoffs and having preempted the possibility that such bargaining might take place by their own abrupt behavior, the Respondents herein violated Section 8(a)(1) and (5) of the Act.

#### 4. Waiver by the Union of the right to bargain

Respondents further assert that, regardless of the applicability of *First National Maintenance* and *Dubuque Packing*, the Union waived its right to notice and an opportunity to bargain over the decision and the effects of the January 10 plant closing and layoff by virtue of a provision in its 1991-1994 contract which states:

*Section 1.* The Company shall have the right to manage the business and direct the working force. Management of the business includes the right to plan, direct, and control all operations; to hire, assign employees to do work, and transfer employees; to promote, demote, discipline, suspend, or discharge employees for just cause; to relieve employees from duty because of lack of work or any other legitimate reasons; to introduce new and improved methods or facilities, or to change existing methods or facilities and the right to make and enforce reasonable rules implemented to carry out the functions of management.

*Section 3.* The Company shall, at all times, determine the number of employees required.

<sup>14</sup> The decision was actually made 3 weeks before it was announced and effectuated.

The Supreme Court long ago stated that the Act disfavors waivers of statutorily protected rights and will find such a waiver only when it has been made in a "clear and unmistakable" manner. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). There is nothing in the above-quoted management-rights clause which confers on the Respondents the right to relocate unit work. The Board held in *Dubuque Packing* that general language in a management-rights clause does not excuse a failure to bargain over plant relocation and that the Union's right to bargain collectively over such decisions, as well as the effects of such decisions, will not be waived unless unit work relocation is expressly spelled out in a contract waiver. No such waiver can be found in the language of the Respondents' contract covering the Speaker Road bargaining unit.

#### 5. The refusal of the Respondents to provide certain information to the Union

It has long been held that an employer is obligated by Section 8(a)(5) of the Act to provide the bargaining agent of its employees with information which is relevant to the performance by the union of its duty as bargaining agent. *NLRB v. Truitt Co.*, 351 U.S. 149 (1956). While the Respondents herein provided the Union with a wealth of detailed information concerning their corporate structure and the interrelation of the various components of the Geiger enterprise, they refused, both orally and in writing, to provide the Union with a list of their customers or the jobsites to which they were making deliveries. They claimed that such information was confidential.

Whether or not requested information is, in the opinion of an employer, confidential is irrelevant to its duty to supply it. The issue is whether the information in question is relevant to the performance by the requesting union of its duties as bargaining agent. *Mary Thompson Hospital*, 296 NLRB 1245 (1989), *enfd.* 943 F.2d 741 (7th Cir. 1991). In this instance, the requesting union asked for a list of the Respondents' customers and the jobsites it was servicing in order to determine whether the Respondents were relocating bargaining unit work that should have been performed by Speaker Road drivers. Such information is not only relevant but crucial to the Union in representing the interests of laid-off members who may have been entitled to perform the work in question. *Blue Diamond Co.*, 295 NLRB 1007 (1989); *Bentley-Jost Electrical Corp.*, 283 NLRB 564 (1987).

As a matter of fact, much of the requested information eventually came to the Union's attention in the course of this litigation and is in evidence in this case. That eventuality is also irrelevant because the duty to supply relevant information is a duty to supply such information in a timely fashion and to provide it to the Union, not to the Board. Accordingly, by failing to supply the Union with information concerning its customers and the jobsites it was servicing, the Respondents herein violated Section 8(a)(1) and (5).

On the foregoing findings of fact and upon the entire record herein considered as a whole, I make the following

#### CONCLUSIONS OF LAW

1. The Respondents, Geiger Ready-Mix Co. of Kansas City, Inc., Geiger Ready-Mix Co. of Kansas, Inc., Geiger Ready-Mix Co. of Missouri, Inc., and Geiger Ready-Mix

Co., Inc., are a single employer and each of them is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541, affiliated with International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time drivers, mechanics, and mechanics helpers and batchmen employed by the Respondent Geiger Ready-Mix Co. of Kansas City, Inc., in the counties of Jackson, Clay, Platte, Ray, Lafayette, Johnson, Bates, Henry, and Cass in Missouri and Wyandotte, Johnson, Leavenworth, and Miami in Kansas, excluding office clerical employees, guards, supervisors, as defined in the Act, and other employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been the exclusive collective-bargaining agent of all employees employed in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to notify the Union and to give it an opportunity to bargain collectively concerning a decision to close the Speaker Road plant, to lay off unit employees, and to transfer unit work to nonunit employees, and by failing and refusing to give the Union an opportunity to bargain collectively over the effects of such decision; by unilaterally relocating unit work to affiliated entities, assigning unit work to employees outside the bargaining unit set forth above, and by laying off unit employees to accomplish these ends; and by refusing to furnish the Union with requested information relating to the relocation of unit work, the Respondents herein violated Section 8(a)(1) and (5) of the Act. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### REMEDY

Having found that the Respondents herein have engaged in certain unfair labor practices, I will recommend that they be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Because the violations of the Act by this employer are pervasive and evidence on its part an attitude of disregard for its statutory obligations and the rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress all violations of that section of the Act. *Hickmott Foods.*, 242 NLRB 1357 (1979). I will recommend that Respondent Geiger Ready-Mix Co. of Kansas City, Inc., be required to offer full and immediate reinstatement to all of its bargaining unit employees to their former or substantially equivalent positions, and that the Respondents be required to make whole those employees for any loss of earnings which they may have sustained by reason of the unlawful transfer of work and layoffs found herein, in accordance with the *Woolworth* formula<sup>15</sup> with interest thereon at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New*

*Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also require the Respondents to reimburse union fringe benefit funds for all moneys which have been unlawfully withheld as the result of the January 10, 1992 layoff, with interest computed at the compliance stage of these proceedings. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

The recommended Order will require the Respondents to restore to the Speaker Road plant and to the bargaining unit, as described above, all bargaining unit work which was unlawfully transferred to nonunit employees. Said work is defined as the proportion of work performed by employees assigned to that plant in that unit in the calendar year immediately preceding the January 10, 1992 layoff to the total amount of work performed by all Respondents in that year. Respondents will also be required to supply to the Union all information requested by it in its letter of March 24, 1992, including, but not limited to, a list of all customers which all Respondents herein have been servicing and a list of all jobsites to which all Respondents have been delivering concrete. I will also require the Respondents to post the usual notice, advising their employees of their rights and of the results in this case.

On the foregoing findings of fact and conclusions of law and on the entire record, I make the following recommended<sup>16</sup>

#### ORDER

The Respondents, Geiger Ready-Mix Co. of Kansas City, Inc., Geiger Ready-Mix Co. of Kansas, Inc., Geiger Ready-Mix Co. of Missouri, Inc., and Geiger Ready-Mix Co., Inc., and each of them jointly and severally, and their officers, agents, attorneys, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith with Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of all of its drivers, mechanics, mechanics helpers, and batchmen employed in a 13-county area in and around Kansas City, Kansas, excluding all office clerical employees, guards, and supervisors, as defined in the Act, and all other employees.

(b) Refusing to bargain with the Union with respect to any decision to shut down its Speaker Road, Kansas City, Kansas facility, to lay off bargaining unit employees employed at such facility, or to transfer bargaining unit work from that facility to nonunit employees, or refusing to bargain with the Union with respect to the effects on bargaining unit employees of any such shutdown, layoff, or transfer of bargaining unit work to nonunit employees.

(c) Unilaterally transferring bargaining unit work performed by bargaining unit employees employed at its Speaker Road, Kansas City, Kansas facility, to nonunit employees or assigning nonunit employees to perform such work, or unilaterally shutting down the facility or laying off bargain-

<sup>15</sup> *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

<sup>16</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ing unit employees to accomplish such shutdown or transfer of bargaining unit work.

(d) Refusing to furnish the Union with information relative to the Union's duty as bargaining agent, including, but not limited to, lists of customers of any of the Respondents and lists of jobsites to which any of the Respondents have delivered concrete.

(e) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union concerning any decision to close down facilities employing bargaining unit employees, to transfer bargaining work out of the bargaining unit, or to assign bargaining unit work to nonunit employees, and bargain in good faith concerning the effects on employees of any such decisions.

(b) Offer to all employees of the Speaker Road, Kansas City, Kansas plant who were laid off on January 10, 1992, full and immediate reinstatement to their former or substantially equivalent positions and make them whole for any loss of pay or benefits suffered by them by reason of the unlawful conduct found herein, in the manner described above in the remedy section.

(c) Transfer back to the Speaker Road bargaining unit all bargaining unit work transferred out of that unit to nonunit employees. Bargaining unit work is defined as that propor-

tion of the total work performed by all Respondents in calendar year 1991 which was performed by bargaining unit employees employed by Geiger Ready-Mix Co. of Kansas City, Inc., at its Speaker Road, Kansas City, Kansas facility.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at all of the Respondents' facilities at Leavenworth, Kansas, and in the Metropolitan Kansas City area copies of the attached notice marked "Appendix."<sup>17</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

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<sup>17</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."